Canada Industrial Relations Board | Conseil canadien des relations industrielles

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Reasons for Decision

Laurent Lavoie,

complainant,

and

Syndicat des Métallos, Local 7065,

respondent,

and

Logistec Stevedoring Inc.; Relais Nordik Inc.;
Porlier Express Inc.,

employers.

Board File: 28094-C

Bruno Jean,

complainant,

and

Syndicat des Métallos, Local 7065,

respondent,

and

Logistec Stevedoring Inc.; Porlier Express Inc.,

employers.

Board File: 28580-C

Bruno Jean,

complainant,

and

Syndicat des Métallos, Local 7065,

respondent.

Board File: 28618-C
Neutral Citation: 2012 CIRB **636**
March 9, 2012

A panel of the Canada Industrial Relations Board (the Board) composed of Ms. Louise Fecteau, Vice-Chairperson, sitting alone pursuant to section 14(3) of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*), considered the above-noted complaints. A pre-hearing conference was held in Montréal, Quebec, on February 10, 2011, and hearings were held in Sept-Îles, Quebec, from July 26 to 28 and on November 10 and 11, 2011.

It was agreed with counsel of record at the start of the hearing that, in the event that the Board determined that there had been violation of the *Code*, any remedy would be determined at a later stage, to give the parties the opportunity to arrive at a settlement on their own or, failing that, to submit their respective positions. Accordingly, the Board will remain seized of the matter. Counsel for the employers also indicated that they wished to be given access to the complainants' medical files if necessary. At the request of counsel for the union, even though the cases were heard jointly, it was agreed that complainant Lavoie would be excluded from the hearing room during Mr. Bruno Jean's testimony and that complainant Jean would be excluded during Mr. Laurent Lavoie's testimony.

Appearances

Mr. Grégoire Dostie, for Messrs. Laurent Lavoie and Bruno Jean;

Mr. Pierre Lalonde, for the Syndicat des Métallos, Local 7065;

Mr. Patrick Galizia, for Logistec Stevedoring Inc.;

Mr. Patrice Boudreau, for Porlier Express Inc.

I–Background

[1] This matter involves three complaints filed with the Board by two complainants. Two complaints were filed by Mr. Bruno Jean (the complainant or Mr. Jean) on February 8 and 28, 2011, respectively, pursuant to section 97(1) of the *Code*. The first is a duty of fair representation complaint (file no. 28580-C), in which Mr. Jean alleges violation of sections 37 and 69 of the *Code*; the second is an unfair labour practice complaint (file no. 28618-C), in which he alleges violation of sections 95(*g*) and 95(*i*) of the *Code*. Mr. Jean alleges that the Syndicat des Métallos, Local 7065 (the union or Local 7065), refused to file grievances to challenge a violation of the seniority rule and a failure to comply with the procedure for dispatching workers. He also alleges that the union used intimidation and coercion against him because he had filed a complaint under the *Code*.

[2] The other complaint is an unfair labour practice complaint (file no. 28094-C) filed by Mr. Laurent Lavoie (the complainant or Mr. Lavoie) on April 20, 2010, pursuant to sections 97(1) and 97(4) of the *Code*, in which he alleges violation of sections 37, 69 and 95(*f*) of the *Code*. Mr. Lavoie alleges that his union refused to recognize his seniority, thereby preventing him from having his name added to the list of employees with job security.

[3] The following are the employers affected by the three complaints:

- Logistec Stevedoring Inc. (Logistec) and Porlier Express Inc. (Porlier), in regard to the complaints filed by Mr. Jean (file nos. 28580-C and 28618-C);
- Logistec, Porlier and Relais Nordik Inc. (Relais Nordik), in regard to Mr. Lavoie's complaint.

[4] The representative for Relais Nordik did not make any submissions regarding the merits of the complaint filed by Mr. Lavoie. He sent a letter to the Board on September 2, 2010, stating that Mr. Lavoie had not worked for Relais Nordik in 2008 and 2009. Therefore, Relais Nordique did not produce any written submissions regarding Mr. Lavoie's complaint and was not represented at the hearings.

II–Preliminary Objection

[5] At the start of the hearing, counsel for the union raised a preliminary objection regarding the complaint filed by Mr. Jean on February 8, 2011, in which Mr. Jean alleged violation of sections 37 and 69 of the *Code*. He submitted that the complaint was untimely, since the circumstances related to the complaint had occurred prior to November 2010, yet the complaint had only been filed on February 8, 2011.

[6] In his complaint, the complainant argues that he did not know about the telephone dispatcher's failure to respect the dispatch procedure established by the union until January 31, 2011. He states that it was also in the days subsequent to January 31, 2011, that he learned that the other four workers added to the list of workers in Appendix A had worked more hours than he did in 2010. The Board took the objection under advisement and asked the parties to address it in their arguments.

III–Facts

[7] The union holds a certification order with respect to the employers affected by the complaints. By order no. 6527-U dated August 29, 1994, the Board certified the union as the bargaining agent for Logistec employees. The bargaining unit description reads as follows:

> all employees of Logistec Stevedoring Inc., including employees in Sept-Iles, Quebec, assigned to loading and unloading of vessels, and employees assigned to receiving and shipping merchandise (coastal and ocean navigation) to vessels, wharfs and warehouses, including stocking merchandise on railway cars, classified as longshoreman, lead hand, mobile crane operator, fork lift operator, checker, guard and docker, **excluding** foremen and those above the rank of foreman, and office personnel.

[8] As for Porlier, at the time of Mr. Lavoie's complaint, filed on April 20, 2010, the union and that employer were bound by a collective agreement in effect from May 21, 2007, to May 20, 2012. This was a voluntarily recognized collective agreement, although, on December 15, 2010, the Board, by order no. 9976-U, certified the Syndicat des Métallos, Local 7065, as the bargaining agent for the following unit:

> all employees of Porlier Express Inc. in Sept-Îles engaged in the loading and unloading of vessels and those engaged in the shipping and receiving of merchandise (coastal and deep sea transportation) to and from vessels, docks or warehouses, as well as in securing and unsecuring merchandise on rail cars, **including** employees classified as longshoremen, team leader, mobile crane operator, lift truck driver and mooring worker, **excluding** office staff, employees covered by another collective agreement, foremen and those above the rank of foreman.

[9] Both collective agreements binding employers Porlier and Logistec respectively and the union are effective from May 21, 2007, to May 20, 2012.

[10] With regard to Relais Nordik, although the Board has never issued a certification order in its respect, that employer is also bound to the union by means of a collective agreement in effect from May 21, 2007, to May 20, 2012.

[11] The two collective agreements binding employers Porlier and Logistec are very similar, in that they both set out a worker dispatch procedure to be followed by the union telephone dispatcher (hiring hall). Additionally, each of the collective agreements contains an appendix entitled "Appendix A Regarding permanent longshoremen–Members of the Syndicat des Métallos–List of members of Local 7065" (translation) (Appendix A), which lists permanent longshoremen. At the time of the renewal of the collective agreements in 2007, there were 45 permanent longshoremen on the list.

[12] Casual longshoremen pay union dues and are paid at the same rates as permanent longshoremen, in accordance with the collective agreements with Porlier and Logistec. However, they are not entitled to group insurance or other benefits provided for in the collective agreement, such as various types of leave. According to union representative Gilles Ayotte, casual longshoremen are not members of the union and are not invited to the union's general meetings for longshoremen. Thus, two groups of workers make use of the union hiring hall's services, that is, the longshoremen listed at Appendix A and the casual longshoremen.

[13] In 2007, when the collective agreements binding Porlier and Logistec respectively and the union were renewed, the union successfully negotiated a seniority clause with the employers for the addition of new employees to Appendix A. Under article 8.03 of the collective agreements, new members were to be added to Appendix A "on the basis of seniority, subject to having worked a

minimum of two hundred and fifty (250) hours in the same year" (translation). Articles 8.02 and 8.03 of the two collective agreements read as follows:

For Logistec:

> 8.02 The employer recognizes that Appendix A lists forty-five (45) employees. The said number of employees shall remain the same throughout the term of the collective agreement.
>
> **8.03 Any new employees shall be added to Appendix A on the basis of seniority, subject to having worked a minimum of two hundred and fifty (250) hours in the same year.**
>
> (translation; emphasis added)

For Porlier:

> 8.02 The employer recognizes that Appendix A lists forty-five (45) employees. The said number of employees shall remain the same throughout the term of the collective agreement.
>
> **8.03 Any new employees shall be added to Appendix A on the basis of seniority, subject to having worked a minimum of two hundred and fifty (250) hours in the same year. This article in no way limits the scope of article 6.02.**
>
> (translation; emphasis added)

[14] Prior to 2007, the addition of new employees to Appendix A was negotiated as part of the renewal of the collective agreements. The casual worker seniority list for 2002, which was entered into evidence, shows that the seniority criterion was to *all intents and purposes* respected when employees were added to Appendix A. The last casual longshoreman added to Appendix A in 2008 was Mr. Max Boudreault. Mr. Boudreault was the longshoreman with the most seniority according to the casual longshoremen list for 2008 entered into evidence.

[15] In late fall 2009, prior to the expiry of the collective agreements, the union approached employers Porlier and Logistec about adding five or seven names to Appendix A. After obtaining an agreement in principle from the employers, the union submitted to both employers a draft agreement for the elimination of the seniority criterion and the addition of five new employees to the appendix.

[16] The letter of agreement signed by Logistec and the union reads as follows:

> The parties agree to the following:
>
> **Notwithstanding articles 8.02 and 8.03**, the employer and the union agree to amend the articles indicated below as follows:
>
> **The addition of new employees to Appendix A pursuant to article 8.03 shall be subject to their having worked a minimum of two hundred and fifty (250) hours in the same year.**
>
> In addition, notwithstanding article 8.02, the employer and the union agree to amend Appendix A to include fifty (50) unionized employees. This letter of agreement shall be effective from the date of its signature. The names added to Appendix A of this collective agreement are the following:
>
> No. 46: Mr. Simon Beaudin
> No. 47: Mr. Sébastien Gravel
> No. 48: Mr. Pierre Bernatchez
> No. 49: Mr. Bruno Jean
> No. 50: Mr. Denis Thérriault
>
> (translation; emphasis added)

[17] The letter of agreement between Porlier and the union is almost identical. The letters of agreement were signed on February 12, 2010, in the case of Logistec and on April 16, 2010, in the case of Porlier.

[18] The three complaints filed by complainants Bruno Jean and Laurent Lavoie relate to the consequences of the elimination of the seniority criterion.

A–Complaints by Mr. Bruno Jean (file nos. 28580-C and 28618-C)

[19] Mr. Jean has worked at the Sept-Îles dock as a casual longshoreman for 13 years. He was among the five workers whose names were added to Appendix A pursuant to the letters of agreement authorizing the addition of new employees to the list therein. His name is 49th on the list.

[20] In his complaint filed on February 8, 2011, the complainant submits that the seniority criterion has always been applied in determining what workers would be added to Appendix A. He submits that eliminating that criterion resulted in his name being placed in 49th position on the list while three workers with less seniority were placed above him. This is the first ground for his complaint.

[21] The complainant also submits that, despite his name being added to Appendix A, he worked fewer hours in the same year than he had worked as a casual longshoreman in 2009. The complainant argues that he had to find another job in October 2010, with Logistec Minerai, in a separate bargaining unit, to be able to meet his financial obligations. He alleges that his union breached article 9.04 of the collective agreements, which requires the telephone dispatcher (the union) to call longshoremen listed in Appendix A on the basis of seniority. This is the second ground for his complaint.

[22] The complainant approached his union at the start of February 2011 to complain about the fact that he had not been called since November 2010. In a letter dated February 1, 2011, the union representative informed him that the telephone dispatcher had attempted to contact him, but that he was never home and that was the reason why he had not been called since November 2010. On February 4, 2011, the complainant, through his counsel, asked the union to file a grievance so that he could get compensated for the lost wages resulting from the failure to respect the dispatch procedure provided for in the collective agreement. That same day, the union informed Mr. Jean that it would not file a grievance. In a letter to Mr. Jean's counsel dated February 7, 2011, and signed by union representative Gilles Ayotte, the latter indicated that there was no cause to file a grievance and stated the following:

> The position of my clients regarding your letter of February 4, 2011, is as follows:
>
> • Upon investigation, the union concludes that **there is no cause to file a grievance** with Logistec Stevedoring based on the information gathered.
>
> • Your client failed to comply with article 9.06 of the collective agreement.
>
> ...
>
> • Your client also received a letter by registered mail last week that dealt with the same matter and reminded him of his responsibilities under article 21.04.
>
> (translation; emphasis added)

[23] On February 8, 2011, Mr. Jean filed his first complaint with the Board. On February 9, 2011, the union's recording secretary sent the complainant a letter in which he accused him of "taking legal

action" (translation) against the union and of "publishing or circulating among the membership false reports or misrepresentations" (translation). The letter reads in part as follows:

> You **are accused of taking legal action against your union** and of publishing or circulating among the membership false reports or misrepresentations.
>
> This constitutes a violation of our constitution and by-laws. You are hereby advised that your rights to attend union meetings and to be a candidate for an office or position **in the union are suspended** until such time as your case is heard by the disciplinary committee. **Additionaly, you are hereby declared a member not in good standing, until further notice**.
>
> (translation; emphasis added)

[24] By way of remedy, the complainant is asking that the Board find that sections 37 and 60 of the *Code* were violated and order that his name be placed on the list of permanent longshoremen at Appendix A ahead of employees Simon Beaudin, Sébastien Gravel and Pierre Bernartchez. The complainant is also asking that he be compensated for lost wages since February 2010 and that the Board order the union to file a grievance. Additionally, he is asking that the Board require the union to henceforth comply with the dispatch procedure in a fair, non-discriminatory manner and order that he be paid damages plus interest for moral damages. He is also asking that the union be ordered to pay all of his counsel's fees and legal costs.

[25] Mr. Jean filed a second complaint on February 28, 2011, pursuant to sections 95(*g*) and 95(*i*) of the *Code*, relating to events on February 8, 2011, at a general meeting of the members of the bargaining unit comprising Logistec Minerai employees, who had recently become unionized under provincial law and were represented by the Syndicat des Métallos, Amalgamated Local 7065. The purpose of the general meeting was to elect a "Union Executive" (Executive Committee). Mr. Yves Bourgeois, President of the Executive Committee for Métallos, Local 7065-48 (Local 7065-48), the bargaining unit of longshoremen to which Mr. Jean belongs, attended the meeting even though he had no role within the new local union. In fact, Mr. Nelson Breton is the president of the Syndicat des Métallos, Amalgamated Local 7065. Local 7065-48, presided by Mr. Bourgeois, is one of 28 unions reporting to Amalgamated Local 7065.

[26] According to Mr. Jean, Mr. Bourgeois had insulted him in front of some 20 unionized workers. He stated that Mr. Bourgeois had done this because he had exercised his rights by filing an unfair

labour practice complaint with the Board on February 8, 2011, the same day the meeting was held. Of note is that it was on February 9, 2011, that Mr. Jean received a letter from his union stating, among other things, that he had lost his status as a member in good standing for "taking legal action" against his union.

[27] By way of remedy, the complainant is asking that the Board order the union to cancel all disciplinary action against him and to desist from intimidating or coercing him for having filed a complaint with the Board pursuant to sections 37 and 69 of the *Code*.

B–Complaint by Mr. Laurent Lavoie (file no. 28094-C)

[28] The crux of Mr. Lavoie's complaint relates to the letters of agreement signed by the union and employers Logistec and Porlier to eliminate the seniority criterion for adding new employees to Appendix A. Although Mr. Lavoie's case is similar to Mr. Jean's, it is not identical, in that his name was not added to the list at Appendix A. Mr. Lavoie has worked at the Sept-Îles dock as a casual longshoreman for about 15 years. As a casual worker, he is sent out on jobs for the employers by the union's telephone dispatcher, as provided for in article 9 of the collective agreements with Logistec and Porlier, entitled "Dispatch procedure" (translation).

[29] In December 2009, Mr. Yves Bourgeois, President of Local 7065-48, told the complainant that his name would be added to the list of permanent longshoremen at Appendix A in January 2010.

[30] In January 2010, the complainant learned that he was not among the five longshoremen whose names had been added to Appendix A. In the complainant's view, his name should have been added, in 46th place. Further, he submits that his union did not give him the opportunity to file a grievance or appeal. The complainant submits that the five workers added to Appendix A have less seniority than he does. One of the workers in question is the son of the union president, who, according to the complainant, has only two or three years of seniority as a longshoreman.

[31] The complainant alleges that his union acted in a discriminatory and unfair manner, contrary to sections 37, 69 and 95(*f*) of the *Code*.

[32] By way of remedy, the complainant is asking that the Board order the union to pay him an amount equal to his gross lost wages since January 29, 2010, and to place his name on the list at Appendix A, in 46th place. He is also asking that the Board require the union to pay all of his counsel's fees and legal costs.

IV–The Evidence

[33] Several witnesses were heard. Counsel for the complainants called Messrs. Denis Fournier, Terry St-Louis, Dany McMullen, Alain Pouliot, Bruno Jean, Sylvain Henry, Denis Gagnon and Laurent Lavoie and Ms. Nancy Duchesne. The union called Messrs. Jean Rioux, Gilles Ayotte, Nelson Breton and Yves Bourgeois. Counsel for Logistec called Ms. Geneviève Gauthier. For ease of reading, the evidence and testimony summarized below are not necessarily in the order in which the evidence was presented.

A–Background to Collective Agreement Amendments Eliminating Seniority Clause

[34] According to the testimony of Mr. Sylvain Henry, Director of Operations at Logistec Stevedoring in Sept-Îles, Ms. Geneviève Gauthier, Director of Human Resources at Logistec, and Mr. Y. Denis Gagnon, Vice-President of Porlier, it was around the end of November 2009 that Mr. Bourgeois, President of Local 7065-48, approached each of the employers about adding employees to Appendix A of the respective collective agreements.

[35] Mr. Henry has been Director of Operations at Logistec Stevedoring in Sept-Îles since June 2009. He stated that Mr. Bourgeois had asked him to raise the number of employees in Appendix A to 52, but that following consultation with Mr. Lefebvre, Vice-President, Human Resources, at Logistec, he had informed Mr. Bourgeois that Logistec would be amenable to raising the number to 50 only. He added that the issue of seniority and the names and ranking of the employees to be added had not been discussed when the addition of employees to Appendix A had first been raised, and he had not discussed these matters with Ms. Gauthier, Director of Human Resources at Logistec, either. On cross-examination by counsel for the union, Mr. Henry stated that it was when he had seen the list

of seven employees to be added that he had told Mr. Bourgeois that he did not agree with adding Mr. Lavoie as "he wasn't around enough" (translation).

[36] Ms. Gauthier testified that she had seen the document sent to her by Mr. Henry on November 25, 2009. The document read as follows:

> **THE PARTIES AGREE TO THE FOLLOWING:**
>
> Notwithstanding articles 8.02 and 8.03, the employer and the union agree to amend the articles indicated below, as follows:
>
> The addition of new employees to Appendix A pursuant to article 8.03 shall be subject to their having worked a minimum of two hundred and fifty (250) hours in the same year.
>
> In addition, notwithstanding article 8.02, the employer and the union agree to amend Appendix A to include fifty-two (52) unionized employees. This letter of agreement shall be effective from the date of its signature.
>
> (translation)

[37] The following is appended to the document:

> List of employees proposed by the union:
>
> **Laurent Lavoie**
> Simon Beaudin
> Sebastien Bourgeois
> Danny McMullen
> Pierrot Bernatchez
> Bruno Jean
> Laurent Lapierre
>
> (translation; emphasis added)

[38] According to Ms. Gauthier, this document originated with the union, which sent it to Mr. Henry, who then sent it to her. She indicated that it was when she had read that document that she had realized that the seniority criterion had been eliminated. She explained that the seniority criterion for determining what workers would be added to Appendix A had been added to the collective agreement during the last round of bargaining, in 2007. Prior to 2007, the names to be added had been decided at the bargaining table during the renewal of the collective agreement. She indicated that, in 2007, the union had even sought to add a seniority clause requiring 500 hours of work in the

same year, rather than 250. Ms. Gauthier stated that, when she had met with Mr. Bourgeois in November 2009, he had spoken about adding five workers rather than seven, contrary to what was indicated in the above-mentioned document.

[39] In her testimony, Ms. Gauthier explained that Logistec had had no reason to object to the union's proposal, given that the seniority criterion had been eliminated. For Logistec, it had meant greater flexibility in selecting labour.

[40] With respect to the letter of agreement signed on February 12, 2010, confirming the addition of five employees and the elimination of the seniority clause, Ms. Gauthier stated that she had known about the letter and had in fact been the one to fine-tune it. Moreover, she was one of two people to sign it on the employer's behalf. She stated that Logistec had not been involved in either the choice or ranking of the employees to be added to Appendix A. As for Mr. Henry, she stated that he had no power to decide to amend the collective agreement. She indicated that she did not know whether or not he had objected to the addition of Mr. Lavoie's name to Appendix A.

[41] In his testimony, Mr. Denis Gagnon, Vice-President at Porlier, indicated that he had met with Mr. Bourgeois and Mr. Nelson Breton, President of the Syndicat des Métallos, Amalgamated Local 7065, at his office. The latter two had been seeking to add names to Appendix A to more effectively meet the labour needs of the employers. According to Mr. Gagnon, however, there had been no increase in operations in November 2009.

[42] Mr. Gagnon indicated that he had been given the names of the proposed workers on December 22, 2009, but he had already given his agreement in principle on December 17, 2009, in a letter he had sent to Mr. Bourgeois, which read as follows:

> Subject: Hiring of five (5) longshoremen
> Proposed letter of agreement
>
> Dear Sir:
>
> In response to your request regarding the hiring of five (5) new permanent longshoremen, our decision, based on the merits of your request and our operational requirements, is as follows.

We agree with the principle set out in your draft letter of agreement, which can be revised jointly. Please provide us with the names of the five (5) longshoremen you wish to add, their dates of birth and a summary of their respective qualifications.

We will see to having the five (5) candidates undergo the usual pre-employment tests, such as a medical and standardized job-related tests, which will be administered by certified professionals. We will strive to have the tests done and obtain results as quickly as possible.

(translation)

[43] On December 22, 2009, Mr. Breton wrote to Mr. Gagnon, to inform him of the following:

Dear Sir:

This is to inform you that, at our general meeting held last **December 21**, the longshoremen agreed to amend, by means of a letter of agreement, the terms and conditions for adding new eligible workers to Appendix A. Further, at the same meeting, the order of seniority was established, as shown below, for five (5) new members who will henceforth be listed in Appendix A of the collective agreement for longshoremen, Métallos Local 7065-48, and who will enjoy all the benefits provided for in the collective agreement. Those workers are as follows:

- No. 46: Mr. Simon Beaudin
- No. 47: Mr. Sébastien Gravel
- No. 48: Mr. Dany McMullen
- No. 49: Mr. Pierre Bernatchez
- No. 50: Mr. Bruno Jean

(translation; emphasis added)

[44] On January 5, 2010, Mr. Gagnon sent Mr. Breton the following response:

Subject: Hiring of five (5) new longshoremen
Local 7065-48
Collective agreement, article 6

Dear Sir:

In early December, you asked for permission to add five (5) employees to the list of longshoremen in Sept-Îles. On December 17, we responded that we were prepared to assess the five (5) candidates. As you know, the assessment process is currently underway.

On December 22, you sent us a letter advising us that the five (5) members were henceforth included on the list of longshoremen. Allow me to remind you that the assessment process currently underway is being carried out at your request, to accommodate you, that it is being carried out at our expense, and that we are handling it with all due diligence.

We therefore ask that you afford us the time needed to carry out the assessment of the five (5) candidates. We will advise you of the results as soon as possible.

(translation)

[45] The letter of agreement was finally signed on April 16, 2010, and the following employees were added to Appendix A:

No. 46: Mr. Simon Beaudin
No. 47: Mr. Sébastien Gravel
No. 48: Mr. Pierre Bernatchez
No. 49: Mr. Bruno Jean
No. 50: Mr. Denis Thériault

[46] Mr. Gagnon stated that, had Mr. Lavoie's name been proposed to him, he would have agreed to it, subject to the medical exam, as for the other candidates. He indicated that he had not looked at the number of hours worked by the employees proposed by the union and in fact did not know which employee had the most seniority.

[47] Mr. Bourgeois has worked as a longshoreman at the Port of Sept-Îles since 1975. His name has been included in Appendix A since March 1993. He was the president of Local 7065-48 from 2002 to 2007 and has been president again since 2009, in addition to being a member of the health and safety committee, the group insurance committee, and the pension fund. In his testimony, he stated that he had met with Mr. Henry twice and that Mr. Henry had refused to add Mr. Lavoie to Appendix A because he considered him to be a "CSST guy" (translation). He added that Mr. Henry had told him that, if Mr. Lavoie was on the list, it was "not going to happen" (translation) and he would not agree to any addition. Mr. Bourgeois stated that he had had no choice but to go along with what Mr. Henry said if he wanted five names added to Appendix A and so, "seniority had to disappear" (translation). Mr. Bourgeois indicated that he had not done anything to defend Mr. Lavoie and had not filed a grievance to challenge Mr. Henry's decision.

B–December 21, 2009, General Meeting of the Syndicat des Métallos, Amalgamated Local 7065

[48] Witnesses Yves Bourgeois, Nelson Breton, Jean Rioux and Dany McMullen attended the union's general meeting on December 21, 2009, in order to propose to the union membership that

the collective agreements be amended to add five new employees to Appendix A and eliminate the seniority criterion. The minutes of the meeting read as follows:

> **Fourteen members attended the meeting** Nelson Breton–Present
> Meeting called to order at 7 p.m. Moved: André Boudro Seconded: J.M. Derosby
>
> The purpose of the meeting is to raise the number of unionized members from 45 to 50. **In order to lower the average age for insurance purposes**, a resolution must be passed to amend the clause of the collective agreement that stipulates that it is necessary to proceed on the basis of seniority.
>
> The vote will be by secret ballot. Moved: Michel McMullen
> Seconded: Jean-Marc Derosby
> Vote counters: André Boudreault and Gilles Arsenault
>
> Voting results
> Yeas: 13
> Nays: 1
>
> Following discussion, the order of the employees is established as follows:
> 1. Simon Ritchie-Beaudin
> 2. Sébastien Gravel
> (3. Dany McMullen – refused to become unionized)
> 3. Pierrot Bernatchez
> 4. Bruno Jean
> 5. Denis Thériault
>
> Meeting adjourned at 8 p.m.
> Moved: Martin Truchon
> Seconded Alain Lavoie
>
> (translation; emphasis added)

[49] According to the testimony of Mr. Rioux, recording secretary for the longshoremen unit, Mr. McMullen refused at the meeting to have his name added to Appendix A and so Mr. Denis Thériault's name was later added. Mr. Rioux stated that he was the one who had drafted the minutes of the general meeting of December 21, 2009. The minutes filed by the union contain a second page signed by Mr. Rioux, which provides an order of seniority that is different from that on the first page. On the second page, Mr. Bruno Jean is in fifth position, while he is fourth on the first page. Mr. Denis Thériault's name appears on the first page, but not on the second page. The witness indicated that the signature at the bottom of the second page indicating that he had drafted the second page was not his signature. He stated that he had not drafted that second page.

[50] Mr. Nelson Breton is the president of the Syndicat des Métallos, Amalgamated Local 7065. He is responsible for 28 different unions, including Local 7065-48, of which Mr. Bourgeois is president. In his testimony, Mr. Breton stated that Mr. Bruno Jean had signed his membership card in front of him and Mr. Bourgeois on January 14, 2010, and had in no way challenged his ranking upon doing so; in fact, he stated, Mr. Jean had been very happy to finally be a member of the union and to have his name added to Appendix A.

[51] Witness Dany McMullen also attended the general meeting on December 21, 2009. Mr. McMullen has worked as a longshoreman since July 18, 2000. He acknowledges that he was on the list of names to be added as permanent longshoremen in Appendix A. He states that he was chosen because Mr. Bourgeois wanted some young people. He states that he refused the union's offer, preferring to continue working as a welder at the rate of 40 hours per week.

[52] Mr. Bourgeois, for his part, indicated that the ranking of the workers added to Appendix A had been decided at the meeting on December 21, 2009. He stated that a notice of the general meeting had been posted. However, after verification, his counsel was unable to provide any proof of the notice.

C–February 8, 2011, General Meeting of the Syndicat des Métallos, Amalgamated Local 7065 to Elect the Executive Committee

[53] In his testimony, Mr. Nelson Breton described the general meeting held on February 8, 2011. The meeting had been chaired by him and union representative Gilles Ayotte. Mr. Bourgeois had been invited to stand guard during the meeting and take attendance. When the meeting had been called to order, Mr. Bourgeois had been introduced and had taken the floor to congratulate the workers on joining the Syndicat des Métallos, Amalgamated Local 7065. Mr. Breton recognized that Mr. Bourgeois had allegedly used the word "double-crosser" (translation) when he had spoken, in that he had said that "there were liars and double-crossers, like anywhere else" (translation). Mr. Nelson stated that Mr. Bourgeois's words had not been aimed at anyone in particular. He explained that this was language often used by Mr. Bourgeois and he meant that "no one should rock the boat" (translation).

[54] Mr. Denis Fournier, an employee and member of the new union, also attended the union meeting on February 8, 2011. Mr. Fournier has worked as an operator at Logistec Minerai since May 3, 2010. He submitted that, as Mr. Bourgeois had taken the floor, he had pointed to Mr. Jean and said to him "we have to watch out for double-crossers" (translation). Another witness, Mr. Terry St-Louis, a day labourer for Logistec Minerai, who also attended the meeting, stated that he had heard Mr. Bourgeois say something to the effect "that there were double-crossers" (translation). He had never seen Mr. Bourgeois prior to that meeting. On cross-examination by counsel for the union, he stated that Mr. Bourgeois had not made any sign to point out someone in the room. The witness indicated that he did not know where in the room Mr. Jean had been located.

D–Dispatch Procedure

1–Mr. Alain Pouliot

[55] Mr. Pouliot worked as a dispatcher for a period of 14 months, from March 4, 2009, to May 2, 2010. He stated that, when dispatching workers, he started with the list of permanent longshoremen, then moved to the list of casual workers, proceeding in order of seniority. With respect to Mr. Bruno Jean, he stated that he had called him like everyone else and he had answered the phone. He added that he had sometimes come in and sometimes not. When questioned by counsel for the union about a document filed by the union that showed Mr. Jean's attendance for 2010, the witness stated that he had not produced the said document, even though his signature was at the bottom of the page.

2–Mr. Jean Rioux, Recording Secretary for the Union

[56] Mr. Jean Rioux has worked as a longshoreman since 1993. He is the union's recording secretary. From 2002 to 2007 and again from May 2010 to December 2010, he also worked as a dispatcher. When questioned by counsel for the union, he described the manner in which he had proceeded to dispatch workers. He stated that he began by calling the longshoremen listed in Appendix A, then called casual longshoremen. His calls had been made on the basis of seniority. He commented on the document entered into evidence by the union that showed the days when

Mr. Bruno Jean had reported for work as a longshoreman in 2010. The document has a "Reported" (translation) entry for each day that Mr. Jean reported for work. That document, though signed by Mr. Alain Pouliot, was produced by witness Rioux. According to that document, Mr. Jean had not worked much between June and December 2010. The witness could not say with certainty whether a blank space meant that Mr. Jean had necessarily been called by the dispatcher or had turned down work. He stated that Mr. Jean had told him in June 2010 that he was in therapy. He stated that, in November 2010, he had told Ms. Duchesne, Mr. Jean's spouse, to ask Mr. Jean to call him if he wanted to work, given that Mr. Jean was working at Logistec Minerai. He indicated that Ms. Duchesne had not told him to call Mr. Jean on his cell phone.

3–Ms. Nancy Duchesne, Spouse of Mr. Jean

[57] Ms. Duchesne is Mr. Jean's spouse. In her testimony, she indicated that she had often answered the union dispatcher for her husband. She stressed that the calls had always been answered by her, her child or her husband. She stated that, in early 2010, the dispatcher had called about 20 times a month. If her husband was away, she would tell the dispatcher to call him on his cell phone. She also indicated that she had often heard the telephone conversations between her husband and the dispatcher, and her husband had rarely turned down an offer of work. She indicated that, even after her husband had found work with Logistec Minerai in October 2010, she had continued to tell the dispatcher to call him on his cell phone, and added that there had been very few calls from that time on.

4–Complainant Bruno Jean

[58] Mr. Jean is 43 years old and has been working as a longshoreman since 1997. His name was added to Appendix A as a permanent longshore employee when the collective agreements were amended in early 2010. Before then, he had worked as a casual longshoreman. He has also been working for Logistec Minerai since November 2010 and is unionized. He has several qualifications: day labourer, team leader, flagman, forklift operator and loader operator. In his testimony, he stated that it was Mr. Bourgeois who had told him in December 2009 that he would be added to the list and he had signed his union membership card in Mr. Bourgeois's office on January 14, 2010. It was then

that he had noticed that he had been placed 49th on the list, even though the three longshoremen placed above him had less seniority. He had told Mr. Bourgeois that "it makes no sense. I'm the oldest one on the list; I'll lose hours" (translation). Mr. Bourgeois had allegedly answered "you'll get as much work, if not more; we need young people to bring group insurance costs down" (translation), allegedly adding, "you're not in the right circle and it's not unusual that I would want to help my son" (translation), in reference to his son, Sébastien Gravel, who was on the list of five workers added to Appendix A. The complainant stressed the fact that Mr. Bourgeois's son had been placed second on the list of five longshoremen, even through he had only two to three years of seniority. The first on the list is Simon Beaudin who, according to the complainant, is the son of an "old union man" (translation), was about 30 years old and had seven or eight years of seniority, which was less than the complainant had.

[59] Mr. Jean alleged that, at his meeting with Mr. Bourgeois in January 2010, he had asked him for a copy of the collective agreement applicable to longshoremen, and Mr. Bourgeois had answered that he did not have time for that and that he should ask Mr. Nelson Breton. The union never provided Mr. Jean with a copy of the collective agreement. Mr. Jean stated in his testimony that, starting in June 2010, he had no longer been called as he should have been as a permanent longshore employee and that, by November 2010, the union had stopped calling him completely. He argued that, in October 2010, he had had to get another job, with Logistec Minerai, as an iron ore worker, a position not related to longshoring, to make ends meet at the end of each month. The witness stated that he had remained available to work as a longshoreman even while he held down the job with Logistec Minerai.

[60] Mr. Jean refuted the union's assertion that he was working full-time for Logistec Minerai and was therefore no longer available to work as a longshoreman. He stated that his work with Logistec Minerai involved irregular work schedules and that he sometimes worked during the day and sometimes, at night. When he worked a night shift, for example, he had the next three days off, and was available on weekends also. He stated that he had turned down longshoring work only once. Mr. Jean also refuted the union's position that it had told him that he had to call the union's dispatcher to inform him of his availability, rather than the other way around.

[61] In his testimony, Mr. Jean also referred to the evening of the general meeting of February 8, 2011, stating that, on entering the room, Mr. Bourgeois had said to him, "well, well, the little double-crosser is here" (translation). Further, when Mr. Bourgeois had taken the floor at the meeting, he had repeated, "we have to watch out for the little double-crossers" (translation). The complainant acknowledged that he had received the letter from the union dated February 9, 2011, and signed by Mr. Ghislain Gagnon, accusing him of taking legal action against the union and informing him that he was suspended as a member in good standing. According to his testimony, he had begun to feel depressed around February 10, 2011. Shortly thereafter, he had informed the union that he would be "off work for medical reasons" until June 2011. Despite this, the dispatcher had called him constantly–he had received 16 calls in February. He testified that, on February 20, he had told the dispatcher, "I told you that I would be off work for medical reasons until June" (translation), to which the dispatcher had responded, "I'm obligated to call you" (translation), although he did not indicate who was obligating him. Mr. Jean stated that in 2010 he worked 404 hours as a permanent longshoreman and 146 hours as a casual longshoreman, for a total of 550 hours, compared with 779 hours in 2009. According to a report by the Maritime Data Center Inc., which was entered into evidence, Mr. Jean in fact worked 404.75 hours as a permanent longshoreman and 142 hours as a casual worker. He admitted to having worked 406 hours for Logistec Minerai in 2010, explaining that the work was not longshoring. Mr. Jean refuted the union's allegations that he had worked 353.5 hours for Logistec Aluminium in 2010, stating that he had actually worked for that division of Logistec in 2009.

[62] Mr. Jean stated that he had called union representative Gilles Ayotte in late January 2011 to ask why the union was no longer calling him for longshoring. After checking with the dispatcher and Mr. Bourgeois, Mr. Ayotte had allegedly told him that it was because he was not available, since he was working elsewhere. Mr. Jean stated that he had then asked Mr. Ayotte to file a grievance and the latter had allegedly answered, "if you're not happy, do what the other guy, Lavoie, did" (translation). The complainant explained that that was when he had called Mr. Laurent Lavoie, who had told him that the three employees added to Appendix A had worked more hours than he did in 2010, even though he was the worker with the most seniority on the list of casual longshoremen.

5–Complainant Laurent Lavoie

[63] Mr. Lavoie has been a casual longshoreman since 1996, working for Porlier and Logistec. His identification number on the list of casual longshoremen is 3606. He has the following qualifications: day labourer, operator, except for cranes, (small and large) forklift operator and loader operator. In his testimony, he stated that he was the person with the most seniority on the list of casual longshoremen, immediately after Mr. Max Boudreault. This is confirmed by the casual longshoremen list dated June 18, 2008, sent to Logistec by the union. Mr. Boudreault had been the person with most seniority on the list, but when his name was added to Appendix A in August 2008, Mr. Lavoie became the person with most seniority. Mr. Lavoie stated that he had worked 735 hours in 2009 despite having had to take three months off work because of an injury. The number of hours worked is confirmed by a Maritime Data Center Inc. report entered into evidence.

[64] According to Mr. Lavoie, Mr. Bourgeois had approached him in December 2009 to tell him that his name would be on the list of five workers to be added to Appendix A, and that everything would be settled by the end of February 2010. He indicated that the union had sworn that he would be the next worker to be added to Appendix A. Mr. Lavoie stated that this was the fourth time that the union had passed him over when adding employees to Appendix A. He knew of no reason why he had not been added. Further, he maintained that no one from the union had advised him that he had not been added to the list; he had deduced that he had been bypassed in January, when other workers had undergone medicals. His last day of work as a longshoreman was January 29, 2010. After that date, given what had just occurred, he informed the dispatcher that he did not feel able to work. Mr. Lavoie indicated that he had felt very tired and depressed. He stated that the dispatcher had called him frequently in February and March, but he had not felt able to work. He indicated that he had officially been off work since May 2010 and was seeing a doctor on a monthly basis. Mr. Lavoie stated that he had never seen the collective agreement between the employers and the union despite requesting a copy several times. He stated that even the list of casual longshoremen had not been posted.

[65] According to Mr. Lavoie, he did not know Mr. Henry, Director of Operations for Logistec in Sept-Îles, that is, the person who had objected to his name being added to the list. He stated that he

was surprised that Mr. Henry had objected, since the first time he had heard his name was when he had been called to testify in the instant matter. In Mr. Lavoie's view, the union had had several people skip ahead of him in the past, and they had been added to Appendix A. He gave as examples Messrs. Alain Denis and Max Israel Desroby, claiming that they had less seniority and fewer hours of work than he did. Yet they had been added to Appendix A in 2007. He indicated that this was also what had happened with Mr. Max Boudreault, who had been added to Appendix A in 2008. Mr. Lavoie indicated that he had spoken to Mr. Bourgeois about the matter in the spring of 2010, and Mr. Boudreau had allegedly told him that he would be next. Mr. Lavoie stated that, as a casual worker, he was not unionized, but had to pay union dues. He stated that he had not filed a grievance in the past because the union had not wanted to do so.

6–Mr. Gilles Ayotte, Union Representative

[66] Mr. Gilles Ayotte has worked for the Syndicat des Métallos since August 15, 2002. Among other things, he is responsible for matters involving the longshoremen bargaining unit. In his testimony, he stated that casual workers such as Mr. Lavoie are paid at the same rates as the longshoremen listed in Appendix A, in accordance with the collective agreements, pay union dues and are members of the bargaining unit. Yet, according to Mr. Ayotte, they are not unionized and are unable to make use of the grievance procedure. In a letter he sent to the Board on June 4, 2010, Mr. Ayotte in fact objected to Mr. Lavoie's complaint filed pursuant to section 37 of the *Code* on the basis that the complainant was not a member of the bargaining unit. He stated that only employees listed in Appendix A were members of the unit. He also indicated in his letter that the same applied to the rules provided for in section 69(2) of the *Code*; members were those workers listed in Appendix A.

[67] Mr. Ayotte also indicated that casual workers do not benefit from the same advantages as the longshoremen listed at Appendix A, such as different types of leave provided for in the collective agreement and group insurance, and are not invited to the general meetings of longshoremen listed in Appendix A.

[68] He indicated that Mr. Jean had called him in late January 2011 to tell him that the dispatcher was no longer calling him. He added that, upon investigation, he had learned that the dispatcher had stopped calling Mr. Jean on November 15, 2010. On February 1, 2011, he sent Mr. Jean a letter explaining the reasons for which he was no longer being called, one of which was that Mr. Jean was working for another employer. On cross-examination by counsel for Mr. Jean, Mr. Ayotte indicated that he did not recall Mr. Jean asking him to file a grievance. He added that, had he felt that there was cause for a grievance, assuming that Mr. Jean had made a request in this regard, he would have filed one.

V–Arguments

A–Counsel for the Complainants

[69] Counsel for the complainants began by stating that Mr. Lavoie had all of the qualifications to be added to Appendix A. Moreover, he submitted that Mr. Bourgeois had promised him in November 2009 that his name would be added, given that he was the worker with the most seniority. As for the fact that Mr. Henry had objected to it on the basis that he was not around enough, counsel submitted that Mr. Henry began his functions as the director of operations for Logistec at the Port of Sept-Îles in June 2009, and that Mr. Lavoie had been off work from mid-June to the end of September 2009. He stated that Mr. Bourgeois, as president of the union, should have informed Mr. Henry of this fact and should have shown him the hours that Mr. Lavoie had worked in 2009, which he failed to do. He alleged that, contrary to what was stated by Mr. Ayotte in his letter of June 4, 2010, casual longshoremen are members of the bargaining unit and are entitled to make use of the grievance procedure. Counsel submitted that Mr. Denis Gagnon, Vice-President of Porlier, did not object to the addition of Mr. Lavoie's name and did not even enquire as to the seniority or ranking of the longshoremen added to Appendix A. He added that neither Mr. Breton nor Mr. Ayotte indicated hearing Mr. Henry object to the addition of Mr. Lavoie's name.

[70] Counsel further submitted that the reason given by the union for eliminating the seniority clause does not hold water. Moreover, he submitted that 14 out of 45 people attended the general meeting of December 21, 2009, which had been called to amend a major clause of the collective agreement.

He added that there is no written proof that a notice of the meeting was ever issued. He argued that even the casual workers were affected by the amendments to articles 8.02 and 8.03 of the collective agreement, yet they had not been invited to the meeting.

[71] Counsel argued that the union's action was arbitrary, lacked objectivity and was contrary to section 37 of the *Code*. He stated that Mr. Lavoie learned that he was not among the workers added to Appendix A in late January 2010 and was not informed of the existence of the letter of agreement until April 2010. He was never informed by the union that his name was not being added to the list. Counsel added that, if Mr. Henry really objected to Mr. Lavoie's name being added to Appendix A, then Mr. Bourgeois should have filed a grievance. Counsel stated that Mr. Bourgeois wanted his son's name added to Appendix A and, in order for that to happen, the seniority criterion had to be eliminated.

[72] Counsel stated that, like Mr. Lavoie, Mr. Jean has a number of qualifications as a longshoreman. He argued that Mr. Jean was told by Mr. Bourgeois that he had been placed 49th on the list on January 14, 2010, at which time Mr. Bourgeois told him, "you're not in the right circle and it's not unusual that I would want to help my son." He also argued that Mr. Jean asked for a copy of the collective agreement as early as January 2010, but never obtained it. He stated that, although Mr. Jean was fully available until October 11, 2010, he did not work the hours that he should have. He submitted that there is no evidence that Mr. Jean was unavailable in 2010, contrary to what the union alleged, and even after October 2010, that is, after he obtained work with Logistec Minerai, Mr. Jean continued to be available to work as a longshoreman. He stated that, in January 2011, Mr. Jean asked Mr. Ayotte, union representative, to file a grievance to challenge the violation of the collective agreement, but the latter refused to do so. Counsel submitted that the union wanted to get rid of Mr. Jean. He stated that Mr. Jean was told on January 31, 2011, "if you're not happy, do what Lavoie did and find a lawyer" (translation). Counsel stated that it was when Mr. Jean called Mr. Lavoie that he learned that the four workers with less seniority had worked more hours in 2010, and that this was even the case for some casual workers. Counsel referred the Board to Exhibit P-3, tab 4, which shows hours worked by all longshoremen in 2010. Counsel submitted that the allegations made against the union are corroborated by the testimony of the complainant's spouse, Ms. Duchesne. Counsel added that the union should have filed a grievance when Mr. Jean asked in

January 2011. He further argued that it was only in January 2011, in talking with Mr. Lavoie, that Mr. Jean learned that the union had not complied with the dispatch procedure, when Mr. Lavoie informed him that four other workers appointed at the same time as he was had worked more hours.

[73] Counsel pointed out that Mr. Jean filed his complaint on February 8, 2011, and it was on the evening of February 8, at the meeting to elect the Executive Committee for the union certified to represent the employees of Logistec Minerai, that Mr. Bourgeois went after Mr. Jean, calling him a "double-crosser." He further points out that it was on February 9, 2011, that Mr. Jean received a letter from the union accusing him of "taking legal action" against it and disqualifying him as a permanent longshoreman.

[74] Counsel argued that the allegations in Mr. Jean's second complaint, filed following the general meeting on February 8, 2011, are corroborated by the testimony of Mr. Denis Fournier.

[75] Counsel is asking that the Board allow the complaints filed by Messrs. Lavoie and Jean.

B–Counsel for the Union

[76] Counsel for the union indicated that the union wishes to maintain an objection in respect of Mr. Bruno Jean's complaint only. Counsel did not challenge the Board's jurisdiction to hear Mr. Lavoie's complaint, contrary to what union representative Ayotte stated in his letter of June 4, 2010, to the Board.

[77] With regard to Mr. Lavoie's complaint, counsel argued that the complainant never complained previously when Messrs. Alain Denis, Gilbert Portier and Max Boudreault were added to Appendix A. He submitted that Mr. Lavoie was not added to Appendix A because Mr. Henry objected, although he admitted that the latter contradicted himself in his testimony. He argued that, under the collective agreement, the union could not demand that Mr. Lavoie's name be added and that the employer had the right to refuse any worker, which it did. He stated that Mr. Bourgeois had to choose: either take the union's interest into account by agreeing to Mr. Henry's demand, and have five longshoremen added to Appendix A, or keep the number of longshoremen at 45. He submitted

that today, the union might have acted differently, but that Mr. Bourgeois was not acting in bad faith when he agreed to drop the seniority criterion to have five workers added to Appendix A. Counsel argued that the prejudice alleged in Mr. Lavoie's complaint is not connected with an error made by the union, if any error was in fact made.

[78] Regarding the allegations that the union failed to comply with the dispatch procedure, counsel argued that Mr. Lavoie did not explain his absences and that he should have exercised his right of redress when he learned that he was not on the list of five workers. Counsel stated that Mr. Lavoie preferred to say nothing and that he continued to refuse to work without providing any explanation. He stressed that Mr. Lavoie should have approached the union rather than remaining quiet. He also stated that the collective agreement was available, contrary to what Mr. Lavoie testified, and that under article 32 of the agreement, the employer is responsible for providing the employee with a copy. He stated that, if there was a violation of the *Code*, no causal relationship exists.

[79] With regard to Mr. Jean's complaints, subject to the preliminary objection raised regarding the timeliness of the first complaint, counsel summarized the allegations made in the two complaints as follows:

- Mr. Jean has more seniority than three other workers whose names were added to Appendix A;
- the union refused to file a grievance;
- from February 2010 to November 2010, the complainant was not called on the basis of seniority;
- the union refused to provide him with a copy of the collective agreement.

[80] With respect to the issue of seniority and the allegation that Mr. Jean should have been 46th rather than 49th on the list, counsel argued that this part of the complaint is clearly untimely, since the complainant knew in January 2010 that he had been placed 49th on the list. With respect to the allegation that the union failed to comply with the dispatch procedure, counsel stressed that the period for filing a grievance is two weeks, yet the facts alleged date back to February through May 2010. He argued that this part of the complaint is out of time as well. With respect to the complainant's ranking in 49th place rather than 46th place, counsel argued that there in nothing in the collective agreement that provides that, when workers are appointed at the same time, the worker

with most seniority has to be ranked first amongst those appointed. He stated that five workers were appointed at the same time and the seniority criterion applies on the basis of the date of appointment.

[81] With respect to the meeting of December 21, 2009, at which the union passed the resolution to eliminate the seniority criterion and add five workers to Appendix A, counsel argued that there was nothing unlawful about the way the union proceeded and that there was nothing in the by-laws to prevent the union from proceeding in that manner. He stated that Mr. Jean never made any complaint of any kind to his union before filing his first complaint. He referred to the testimony of Mr. Nelson Breton, who stated that, on January 14, 2010, Mr. Jean had been satisfied that his name had been added to Appendix A and had even seemed happy about it. Counsel further argued that Mr. Jean in no way indicated that he was unhappy about his ranking. When he asked the union to file a grievance, it was concerning his allegation that he had not been called frequently enough. He added that witness Rioux showed that he had called Mr. Jean and witness Pouliot also stated that everyone had been called, which shows that the union had not failed to comply with the dispatch procedure, as alleged by the complainant. Counsel also stated that Mr. Jean told the union that he was in therapy and that was the only explanation given by Mr. Jean for not saying anything.

[82] Counsel moreover argued that, starting in mid-October 2010, Mr. Jean had a full-time job and that witness Rioux indicated in his testimony that Mr. Jean had often turned down work.

[83] With respect to the second complaint filed by Mr. Jean, regarding the events at the February 8, 2011, meeting, counsel argued that Mr. Fournier's testimony was contradicted by the other witnesses. Only witness Fournier said that Mr. Bourgeois had pointed to Mr. Jean. Mr. Bourgeois denied this allegation. Counsel stated that Mr. Jean may have felt targeted, but that was his problem, not Mr. Bourgeois's. Counsel stated that there is nothing in the evidence that shows that Mr. Jean's reputation was harmed.

[84] Counsel for the union submitted that the amendment or elimination of the seniority clause was unfortunate, but that there is nothing in the evidence to indicate any malicious intent or action on the part of the union or even any arbitrary or discriminatory conduct in relation to the complainants. He

stated that the evidence presented may reveal a lack of thoroughness, but should not give rise to any kind of censure of the union's conduct.

[85] Counsel submitted that, in the event that the union is found at fault, the Board's jurisdiction is limited to ordering the parties to negotiate a solution to ensure that there is no discrimination or, **alternatively**, to ordering that the grievance be referred to arbitration, in the event that the Board rules that the union should have filed a grievance on behalf of Mr. Jean.

C–Counsel for Logistec

[86] Counsel for employer Logistec echoed the arguments of counsel for the union in regard to Mr. Jean's first complaint relating to his ranking, presenting virtually the same arguments. Additionally, counsel submitted that the complainant is in no way challenging the letter of agreement with the union, which sets out the names of the five workers and eliminates the seniority criterion.

[87] Further, counsel submitted that, according to the evidence, Mr. Bourgeois met with the complainant in July 2010 and the latter told him that he was not getting his 40 hours of work. However, Mr. Jean did not file his complaint until February 2011. Counsel added that Mr. Jean had known since October 2010 that he was no longer being called, yet did not file his complaint until February 2011.

[88] With respect to Mr. Lavoie's complaint, counsel for Logistec argued that the complainant at no time asked that the letter of agreement between Logistec and the union be cancelled. Counsel raised the question of whether or not Mr. Lavoie's name should have been added to Appendix A, indicating that the reasons given by the union for not adding Mr. Lavoie's name were insurance costs and Mr. Henry's objection to Mr. Lavoie. He stated that a document was entered into evidence and, as of November 25, 2009, Mr. Lavoie's name was the first of seven names on the list, but that the union was not complying with the seniority criterion even then. Counsel submitted that, according to Mr. Bourgeois's testimony, Mr. Lavoie's name had been crossed out at Mr. Henry's request. Counsel stated that this allegation does not hold water and that the evidence shows that Mr. Bourgeois never informed Mr. Henry of the exact number of hours worked by Mr. Lavoie in 2009, if indeed

Mr. Henry ever made an argument in that regard. Counsel argues that, even if Mr. Henry was not entirely correct in regard to what he had said concerning Mr. Lavoie, it was up to the union to stand up to the employer and to file a grievance against the decision not to accept Mr. Lavoie. Additionally, counsel argued that, as was shown, Mr. Henry did not have the power to amend the collective agreement. Also, the employer had no control over the union's general meeting of December 21, 2009, at which the workers' names were chosen. Counsel submitted that the employer cannot be faulted for agreeing to the elimination of the seniority criterion or for insisting that only five rather than seven workers be added to Appendix A.

[89] Counsel also argued that, should Mr. Lavoie's complaint be maintained, the employer cannot be held responsible or even impleaded in this case, since it had no right of review of any kind over the order of placement on the list of workers appointed following the vote at the union's general meeting. He also added that the complainants cannot now ask that the letter of agreement between Logistec and the union be cancelled.

D–Counsel for Porlier

[90] Counsel for Porlier argued that Mr. Jean's complaint is untimely, as was argued by counsel for the union and for Logistec. He added that the complaints in this case have nothing to do with Porlier and, in light of the evidence, it seems that the union acted ineptly in suggesting to the employer that the seniority criterion be eliminated. He submitted that the union made the suggestion on its own initiative and that Porlier obviously should not have to suffer any prejudice or consequences whatsoever as a result. He submitted that the evidence showed that the employer did not know who was on the list of casual workers and did not have that list in its possession. On the contrary, its vice-president, Mr. Gagnon, had even asked the union to suggest the names of the workers it wanted added. Additionally, he submitted that Porlier had nothing to do with the general meeting held on December 21, 2009, or the decisions that the union made at that meeting based on the agreement of the employees in attendance. He added that the union clearly was inept and careless and failed to properly handle the matter, and submitted that Porlier should not have to suffer the consequences of its actions or be enjoined in the case. He stated that there is nothing in the evidence to show that Porlier put any pressure whatsoever on the union in regard to the choice of workers or their ranking.

He added that, in fact, no evidence was presented to show that Porlier had been informed that Mr. Henry at Logistec had expressed reservations regarding Mr. Lavoie.

VI–Analysis and Decision

A–Preliminary Objection

[91] The union raised a preliminary objection regarding one of Mr. Jean's complaints, filed on February 8, 2011, in which he alleged violation of sections 37 and 69 of the *Code*. The union and the employers allege that the complaint is untimely.

[92] Under section 97(2) of the *Code*, a complaint pursuant to sections 37 and 69 must be made not later than 90 days after the date on which the complainant knew or in the opinion of the Board ought to have known of the action or circumstances giving rise to the complaint.

[93] According to the evidence, Mr. Bourgeois apparently told the complainant in January 2010, when the latter signed his union membership card, that he would be working as many hours as before, if not more. The union failed to inform Mr. Jean in January 2010 that the seniority clause had been eliminated on December 21, 2009. It also failed to give him a copy of the collective agreement that he requested, which had not yet been officially amended and signed by the parties and still provided that seniority was to be taken into account in adding new names to Appendix A. Mr. Jean was kept in the dark by his union.

[94] Additionally, the general meeting at which the union approved the amendment regarding the seniority criterion was held on December 21, 2009. Mr. Jean, who at that time was a casual worker, was not invited to the meeting even though his rights were directly affected by the elimination of the seniority criterion.

[95] Further, it was not until November 13, 2010, when the union stopped calling him completely, that the complainant realized that there had been a change in the dispatch procedure. At the end of January 2011, Mr. Jean asked the union to file a grievance on his behalf, given that the union was

no longer calling him. The union representative, Mr. Ayotte, refused to do so, telling him to file a complaint with the Board, as Mr. Lavoie had done. Mr. Jean contacted Mr. Lavoie and learned from him that three other employees with less seniority than he had worked more hours in 2010 and that the union had eliminated the seniority criterion. Given the circumstances, including the fact that the union had kept Mr. Jean in the dark by failing to inform him that the seniority criterion had been eliminated and the fact that it had never provided him with a copy of the collective agreement, the Board finds that the complaint was filed in a timely manner, as the complainant did not learn of the circumstances giving rise to the complaint until January 2011 or, at the earliest, November 13, 2010, when the union ceased to call him.

[96] It is useful to note that, even though the complainant knew of the circumstances giving rise to his complaints no earlier than November 13, 2010, the Board has the authority to consider evidence of the union's conduct over a period of more than 90 days. The Board considers that the relevant period here for purposes of the evidence is the period between the time when the union approached the employers to have members added to Appendix A, that is, November 2009 (including the union's ensuing conduct) and the date on which the complaints were filed. That period is important to understand the context that gave rise to the complaints. The Board will not necessarily find that a complaint is untimely just because certain circumstances occurred prior to the time when the complainant knew of the specific occurrence giving rise to the complaint. In any event, in the particular circumstances of this matter, and given the fact that the complainant was not informed of the possibility that the seniority criterion would be eliminated and did not receive a copy of the collective agreement after asking for it, the Board would have used its discretion under section 16(*m.1*) of the *Code* to extend the 90-day period for filing the complaint in order to include the circumstances surrounding the elimination of the seniority clause, since the time period in question would have been outside Mr. Jean's control.

B–Section 37 Complaints

[97] The purpose of section 37 of the *Code* is to provide for sanctions against a union and its representatives for acting in a manner that is arbitrary, discriminatory or in bad faith in the representation of employees pursuant to the collective agreement. Section 37 reads as follows:

> 37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

[98] The duty of fair representation has been the subject of many Board decisions and the standard test is set forth in *Canadian Merchant Service Guild* v. *Gagnon et al.*, [1984] 1 S.C.R. 509. In that decision, the Supreme Court set out the following principles:

> The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.
>
> 1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
>
> 2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
>
> 3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.
>
> 4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
>
> 5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.
>
> (page 527)

[99] As seen above, the Supreme Court indicated that the duty of fair representation arises from the exclusive power given to the bargaining agent to speak **on behalf of all employees of the bargaining unit**. In the case before the Board, the casual workers are members of the bargaining units concerned and pay union dues. The union is thus required to fulfill its duty of fair representation of that category of employees. This does not mean that casual employees must necessarily have the same rights under the collective agreement as permanent employees; however, they cannot be excluded from the grievance procedure under section 57 of the *Code* (see *Elliston* (1982), 47 di 103; and [1982] 2 Can LRBR 241 (CLRB no. 364)). The Board recently found that a union had acted in an arbitrary and discriminatory manner when it excluded an entire category of

employees from the application of the collection agreement even though the union was certified by the Board to represent a bargaining unit that included that category of employees (voir *Spragg*, 2011 CIRB 610).

[100] The cases now before the Board involve two complainants who worked as casual longshoremen at the Port of Sept-Îles for more than 13 years. The issues raised relate to the fundamental job rights of those workers. In Mr. Jean's case, even though he was added to Appendix A, he complains that he was not ranked 46th as he believes he should have been. As for Mr. Lavoie, who according to the list of casual workers has the most seniority, he states that the union should have added him to Appendix A and ranked him above the five longshoremen added to the list.

[101] The evidence shows that the dispatcher called the permanent longshoremen in the order in which they appeared in Appendix A. The workers' ranking was therefore important. Additionally, permanent longshoremen listed in Appendix A enjoy several benefits under the collective agreement, including different types of leave, a group insurance plan, and an employer contribution to a pension plan, as well as more advantageous vacation allowances.

1–Elimination of Seniority Criterion

[102] The union's representation in this matter may be assessed from two perspectives: the reasons for the union's decision to eliminate the seniority criterion provided for in the collective agreement and the impact of that decision on the complainants.

[103] According to the evidence, the reasons that led the union to eliminate the seniority clause that it itself had negotiated at the time the last collective agreement was signed are unclear, to say the least, and perhaps even questionable.

[104] According to Mr. Bourgeois's testimony, which is contradictory in regard to the reasons for the seniority clause being eliminated, it was, first, a matter of insurance. However, no evidence was presented in this regard, except for brief minutes that indicate "to lower the average age for insurance

purposes, a resolution must be passed to amend the clause of the collective agreement that stipulates that it is necessary to proceed on the basis of seniority" (translation). Neither the union nor the employers showed that there was any problem whatsoever with the group insurance plan. According to the testimony of Mr. Dany McMullen, who was offered the opportunity to have his name added to Appendix A, the president, Mr. Bourgeois, "wanted some young people" (translation). Clearly, had the seniority clause not been eliminated, based on the list of casual workers entered into evidence, Sébastien Gravel, the son of the president, Mr. Bourgeois, would not have had his name added to Appendix A, Mr. Lavoie's name would have been added in 46th place, and Mr. Jean's name would have been next.

[105] Another reason given by Mr. Bourgeois for the elimination of the seniority criterion was that Mr. Henry, Director of Operations at Logistec Stevedoring, objected to the addition of Mr. Lavoie's name and so he had had no choice but "to make seniority disappear" (translation) if he wanted to have five names added to Appendix A. Regardless of whether or not Mr. Henry objected to Mr. Lavoie being added, it is surprising to say the least that a union would agree to drop a key clause such as a seniority clause because of a refusal by the employer to ensure compliance with it. According to the evidence, Mr. Bourgeois did not attempt to persuade Mr. Henry to see reason, nor did he file a grievance to challenge the employer's decision.

[106] The document that Mr. Henry sent Ms. Gauthier on November 25, 2009, contained a list that included Mr. Lavoie's name. This would have been a good time for Mr. Henry to discuss the matter with Ms. Gauthier, but he did not do so. Ms. Gauthier's testimony is clear: she had not known that Mr. Henry had objected to Mr. Lavoie's inclusion in Appendix A. She added that, in any event, Mr. Henry did not have the power to approve an amendment to the collective agreement. Additionally, as submitted by counsel for Logistec, the union's letter of November 25, 2009, to Mr. Henry clearly shows not only that Mr. Lavoie's name was included, but also that the union was not complying with the order of seniority on the list of casual workers entered into evidence. This is clear indication that, as of November 25, 2009, the union had already decided to eliminate the seniority clause and appoint the people it wanted to appoint.

[107] It would be unreasonable to say the least to place responsibility for the elimination of the seniority clause on the shoulders of employer Logistec when the evidence shows that employer Porlier, which was just as involved in the amendment of the collective agreement as Logistec, never even discussed the names of the workers proposed by the union. Mr. Gagnon testified that, if Mr. Lavoie's name had been proposed to him, he would have agreed to it, subject to the required medical exam, in the same way as for the other candidates. Neither Ms. Gauthier at Logistec nor Mr. Gagnon at Porlier commented on the names suggested by the union.

[108] The letter that Mr. Nelson Breton, President of the Syndicat des Métallos, Amalgamated Local 7065 sent Mr. Gagnon at Porlier on December 22, 2009, that is, the day after the general assembly of union members, reveals a great deal about the importance for a longshoreman of being added to Appendix A. It reads in part as follows:

> This is to inform you that, at our general meeting of December 21 last, the longshoremen agreed to amend, by means of a letter of agreement, the terms and conditions for adding new eligible workers to Appendix A. Further, at the same meeting, the order of seniority was established, as shown below, for five (5) new members who will henceforth be listed in Appendix A of the collective agreement for longshoremen, Métallos Local 7065-48, and **who will enjoy all the benefits provided for in the collective agreement**.
>
> (translation; emphasis added)

[109] The Board finds that responsibility for the elimination of the seniority criterion provided for in the collective agreement lies with the union. The union is the one that initiated the process with the employers to increase the number of longshoremen listed in Appendix A and to have the collective agreement amended. The union is also the one that suggested to the employers what five casual workers should be added and what ranking they should be given. Additionally, the union is the one that sent a draft letter of agreement to eliminate the seniority criterion in the collective agreement to both employers. The general meeting of December 21, 2009, was attended by 14 of 45 members, including Messrs. Breton and Bourgeois, and according to the minutes lasted one hour. There is no evidence that a notice of the meeting was sent to all the longshoremen listed at Appendix A; at least, the union did not keep a copy. Also, surprisingly, the casual longshoremen were not invited to the general meeting even though it was called to address eliminating a criterion that affected their fundamental rights, that is, their crucial job-related interests and the job security

provided for workers included in Appendix A. The casual longshoremen are members of the bargaining unit and also pay union dues.

[110] In a key Board decision, *Cairns*, 1999 CIRB 35 (affirmed on reconsideration in *Cairns*, 2000 CIRB 70 and upheld on judicial review in *VIA Rail Canada Inc.* v. *Cairns*, [2001] 4 F.C. 139 (C.A., no. A-749-99)), the Board ruled that the union had not fairly represented the interests of all of its members and had breached its duty of fair representation in the context of collective bargaining. The Board ruled that, where critical interests are at stake, the union must even more seriously turn its mind to the circumstances of those who in all likelihood will be adversely affected by its decision. It stated that, among other things, the following tests were required:

> [107] ... Has the union fulfilled its institutional role in representing all its members? Were employee rights within the regime of collective bargaining appropriately protected? Were critical job interests such as seniority, discipline and job security suitably considered in the collective bargaining process?

[111] The Board added the following:

> [112] As the defender of this most important principle, the union cannot afford to take a careless or casual attitude when continuing employment is at stake. As representative of the bargaining unit as a whole, it has a duty to achieve a certain fairness between all groups. Its position and decisions must not be seen as giving undue advantage to one group over another or allowing extraneous interests to cloud the issue. The Board has consistently found that the bargaining agent will be held to a much stricter standard where the career path of an employee may be seriously jeopardized and its actions more closely scrutinized than in other cases.

[112] In the instant matter, the Board notes that the union clearly did not weigh the consequences for the casual longshoremen, such as Messrs. Lavoie and Jean, when it decided to eliminate the seniority clause negotiated in 2007. What was so urgent that the seniority clause had to be eliminated before the scheduled expiry of the collective agreement in May 2012? The evidence did not reveal any labour problems. At least, Mr. Gagnon, Vice-President of Porlier, clearly indicated in his testimony that there had been no increase in operations in November 2009. The reasons given by Mr. Bourgeois, such as the insurance issue or the fact that Mr. Henry at Logistec Stevedoring objected to Mr. Lavoie and that the seniority clause had to "disappear," make no sense. In the Board's view, the only plausible reason was to have his son's name added to Appendix A. Without the elimination of the seniority clause, Mr. Bourgeois' son, whose ranking was far below the rankings of Mr. Lavoie and Mr. Jean on the casual workers list, could not have been added to

Appendix A for a long time, since he had little seniority–two or three years at most. The only way to get his name into Appendix A was to drop the seniority criterion. The Board rejects the testimony that Logistec objected to Mr. Lavoie's name being added to Appendix A. The evidence showed that the employers agree to the lists produced by the union without questioning the employees' rankings. The employers therefore cannot be held responsible for agreeing to the union's suggestion regarding ranking for purposes of Appendix A.

[113] As the bargaining agent, the union has exclusive authority to bargain collectively. It must exercise that authority fairly and without discrimination in representing all of the employees it represents, regardless of whether or not they have signed a membership card. Indeed, the casual longshoremen should expect their union to defend them when discussing critical interests such as their job security. The Board finds it most surprising that casual workers are not invited to the union's general meetings, especially when their job security is at stake. The interests of Messrs. Jean and Lavoie were damaged by the elimination of the seniority criterion, which was proposed to both employers by the union.

[114] For these reasons, the Board finds that the union failed to fulfill its institutional role in representing all of the members of the bargaining unit, including the casual longshoremen, and failed to protect or take into account the critical seniority interests of the casual longshoremen when it negotiated the agreements with the employers to eliminate the seniority clause. The Board finds that the union gave an undue advantage to one group of employees over other employees with more seniority and that it did so for arbitrary reasons. The Board therefore rules that the union violated section 37 of the *Code* when it decided to eliminate the seniority clause.

2–Union's Refusal to File a Grievance on Behalf of Mr. Jean

[115] With respect to the part of Mr. Jean's complaint alleging that his union refused to file a grievance in January 2011, the Board finds that the union should have more carefully considered Mr. Jean's request before refusing to file a grievance, rather than telling him to go to the Board. In *Adams*, 2000 CIRB 95 (affirmed in *Adams*, 2001 CIRB 121 and upheld on judicial review in

Canadian Council of Railway Operating Unions v. *Adams*, 2002 FCA 64), the Board noted the following in regard to matters relating to an employee's fundamental rights:

> [57] In the present case, the Board finds that Mr. Adams' grievance addresses the issue of rights that are fundamental to his career, that is, the right to work and seniority rights. The union therefore had to handle the matter in a serious manner, taking into account the facts contained in his file. ...

[116] Mr. Jean told his union that he was not working full time for Logistec Minerai, or at least that he was working irregular hours that allowed him to also work as a longshoreman. The union therefore had a duty to consider Mr. Jean's request seriously, based on the facts contained in his file, which it did not do. According to Mr. Jean's testimony, the union representative told him, "if you're not happy, do what the other guy, Lavoie, did." The Board finds that the union breached its duty of fair representation under section 37 of the *Code* by adopting a cavalier, uncaring and arbitrary attitude toward Mr. Jean. The Board's case law defines arbitrary conduct as failing to carefully consider the substance of a case, failing to investigate on the basis of existing evidence or to act on such investigation, or even demonstrating an indifferent or cursory, negligent, capricious or uncaring attitude.

C–Section 69 Complaint and Dispatch Procedure

[117] Section 69 of the *Code* reads as follows:

> 69.(1) In this section, "referral" includes assignment, designation, dispatching, scheduling and selection.
>
> **(2) Where, pursuant to a collective agreement, a trade union is engaged in the referral of persons to employment, it shall establish rules for the purpose of making such referrals and apply those rules fairly and without discrimination.**
>
> (3) Rules applied by a trade union pursuant to subsection (2) shall be kept posted in a conspicuous place in every area of premises occupied by the trade union in which persons seeking referral normally gather.
>
> (emphasis added)

[118] In *Brewer*, 2000 CIRB 54, the Board described the scope of its review and the limits placed on it in reviewing the union's conduct respecting complaints such as those under section 69 now before it. In that matter, the complainants alleged that the formulation of the rules for placement on

the reserved bullpen list were flawed, in that the rules were unfair in and of themselves and were not applied equally and consistently to all applicants and were therefore not applied fairly and without discrimination. In addressing the matter of the rules for referring workers and the rules for joining the union and for moving up the ranking on the bullpen list, the Board stated the following:

> [47] ... it is not the Board's role to assess whether the rules in question here are good rules, the best rules or whether other rules would have been more appropriate. Clearly, **the Board's only role is to evaluate the process by which the union developed and applied the Rules to determine whether, in its view, the Rules were fair and non-discriminatory and were administered in a fair and non-discriminatory manner**.
>
> (emphasis added)

[119] In *Brewer*, *supra*, the Board adopted the definition of "discrimination" provided by the Nova Scotia Labour Relations Board in *Daniel Joseph McCarthy*, [1978] 2 Can LRBR 105, which reads as follows:

> In our opinion **the word "discriminatory"** in this context **means the application of membership rules to distinguish between individuals or groups on grounds that are illegal, arbitrary or unreasonable**. A distinction is most clearly illegal where it is based on considerations prohibited by the *Human Rights Act*, S.N.S., 1969, c. 11, as amended; a distinction is arbitrary where it is not based on any general rule, policy or rationale; and a distinction may be said to be unreasonable where, although it is made in accordance with a general rule or policy, the rule or policy itself is one that bears no fair and rational relationship with the decision being made. ...
>
> (page 108; emphasis added)

[120] In the instant matter, the union and employers Logistec and Porlier are parties to collective agreements under which the union operates a hiring hall referral system by which the union refers longshoremen for employment and with respect to which section 69 of the *Code* is applicable. Although Messrs. Jean Rioux and Alain Pouliot testified that the dispatch procedure was based on the ranking in Appendix A, that ranking was a direct consequence of the elimination of the seniority criterion. The evidence revealed that the complainants worked less in 2010 than they had in 2009 and that their co-workers with less seniority, including Mr. Gravel, the son of Mr. Bourgeois, worked more hours in 2010.

[121] As indicated above, the role of the Board under this section is to evaluate the process by which the union developed and applied the rules in order to determine whether the rules were fair and

non-discriminatory and were administered in a fair and non-discriminatory manner. In *McLean* (1996), 101 di 22; and 96 CLLC 220-025 (CLRB no. 1156) (upheld on judicial review in *International Longshoremen's and Warehousemen's Union, Local 502* v. *Rodney McLean*, no. A-285-96, September 26, 1996 (F.C.A.)), the Board held that a policy under which the union draws a distinction between relatives and non-relatives of union members falls under the definition of discrimination within the meaning of section 69 of the *Code*. The Board has already found that the union acted in an arbitrary manner in eliminating the seniority clause. Establishing rankings no longer in line with the seniority criterion was also arbitrary and resulted in favouritism toward to certain workers who were relatives of union members. For these reasons, the Board finds that the union violated section 69 of the *Code*.

D–Complaints under sections 95(*f*), (*g*) and (*i*) of the *Code*

[122] Sections 95(*f*), (*g*) and (*i*) read as follows:

> 95. No trade union or person acting on behalf of a trade union shall
>
> ...
>
> (*f*) expel or suspend an employee from membership in the trade union or deny membership in the trade union to an employee by applying to the employee in a discriminatory manner the membership rules of the trade union;
>
> (*g*) take disciplinary action against or impose any form of penalty on an employee by applying to that employee in a discriminatory manner the standards of discipline of the trade union;
>
> ...
>
> (*i*) discriminate against a person with respect to employment, a term or condition of employment or membership in a trade union, or intimidate or coerce a person or impose a financial or other penalty on a person, because that person
>
> ...
>
> (iii) has made an application or filed a complaint under this Part.
>
> (emphasis added)

[123] In *Horsley et al.* (1991), 84 di 201; and 15 CLRBR (2d) 141 (CLRB no. 861), the Board reviewed and outlined the approach it uses when determining whether there has been a violation of section 95(*f*) or (*g*):

> Obviously, sections 95(*f*) and (*g*) are directed at **internal affairs of trade unions** and in recognition of a reluctance to interfere in internal union matters, Parliament provided an opportunity for union members and trade unions to resolve this type of dispute through unions' internal appeal processes. To this end, **section 97(4) prohibits complaints alleging violations of these sections of the *Code* from being brought to the Board until internal appeal procedures have been exhausted**.
>
> (pages 204; and 143)

[124] Mr. Lavoie filed a complaint pursuant to section 95(*f*) of the *Code*. In the Board's view, section 95(*f*) does not apply to Mr. Lavoie's case, since his complaint does not involve the internal affairs of the union, but rather a provision of the collective agreement that provided for a seniority criterion for adding new employees, as well as the effect of the elimination of said criterion on Mr. Lavoie. The union's conduct in this regard has already been considered, under sections 37 and 69 of the *Code*.

[125] Mr. Jean, for his part, cites sections 95(*g*) and (*i*) in his second complaint. The Board recalls that it was after Mr. Jean filed his first complaint with the Board under sections 37 and 69—indeed, the very next day—that the union sent him a letter accusing him of "taking legal action" against it. The union in fact suspended him as a member in good standing and indicated that this would stand until a disciplinary committee heard his case. According to the testimony of Mr. Ayotte, union representative, the disciplinary committee has still not taken any action in regard to this matter.

[126] When Mr. Jean filed his complaint, on February 28, 2011, the conditions set out in section 97(4) of the *Code* for filing a complaint under section 95(*g*) had not been met. Indeed, as indicated in *Horsley et al.*, *supra*, the internal appeal mechanisms of a union must be exhausted before a complainant may file a complaint under section 95(*f*) or (*g*). However, section 97(5) of the *Code* makes an exception to that rule, but the Board must be satisfied that the action or circumstance giving rise to the complaint is such that the complaint should be dealt with without delay, or that the union has not given the complainant ready access to a grievance or appeal (see *Gillis et al.* (1990), 79 di 131 (CLRB no. 773)).

[127] The Board finds that Mr. Jean's complaint falls more under section 95(*i*) of the *Code*. In *Nowotniak and Ostby et al.* (1979), 34 di 835; and [1979]2 Can LRBR 466 (CLRB no. 194), the Board described the twofold purpose of section 95(*i*) of the *Code* as follows:

> Section 185(i) is a companion section to sections 184(3)(*a*)(iii) to (v) and (*e*) which prohibit employer action against persons who have participated in Board or other proceedings under Part V of the *Code*. These provisions of the *Code* have at least a twofold purpose. **They are intended to ensure rights under the *Code* are real and not merely illusionary and capable of being frustrated by acts designed to discourage their exercise. They are also intended to encourage honest and candid testimony and free participation in proceedings before this Board and other bodies acting under Part V** (see *Giant Yellowknife Mines Ltd.* 19 di 147; [1977] 1 Can LRBR 483; 77 CLLC 16,082). To achieve these purposes, as with other antidiscrimination sections, motive is usually a constituent element (see *Canadian Imperial Bank of Commerce, North Hills Shopping Centre* 34 di 651; [1979] 1 Can LRBR 266). However, for the many reasons cited in relation to alleged discrimination by employers against employees and for stronger reasons supporting the interest of free access to Board proceedings, the prohibited motivation in these sections need not be the sole motive (see *Yellowknife District Hospital Society* (1977), 20 di 281; 77 CLLC 16,083). It is essential to preservation of rights under the *Code* and the effective operation of the Board and other tribunals and the role of the Minister and other persons under Part V in the attainment of the objectives of the *Code* that employers and unions not act against one another or other persons by any motivation born out of reprisal for having used or participated in the processes of the *Code*.
>
> (pages 845–846; and 475; emphasis added)

[128] In the instant matter, the union's letter dated February 9, 2011, that is, the day after Mr. Jean filed his complaint with the Board, is perfectly clear. The union accuses Mr. Jean of "taking legal action" against it and adds that doing so constitutes "a violation of our constitution and by-laws." In the Board's view, the union had no authority to suspend Mr. Jean as a member in good standing on the basis that he had filed a complaint with the Board. The provision of the union's constitution in this regard contravenes section 95(*i*) of the *Code*.

[129] With regard to what Mr. Bourgeois allegedly said on February 8, 2011, at the meeting of the Syndicat des Métallos, Amalgamated Local 7065, held to elect the Executive Committee, the Board is satisfied that the remarks were aimed at Mr. Jean. The evidence showed that, apart from the union leaders, Mr. Bourgeois did not know any employees other than Mr. Jean; further, Mr. Bourgeois had no connection to this union related to Logistec Minerai and the Syndicat des Métallos. This behaviour on the part of a union leader is unacceptable and shows a lack of respect toward the members the union represents.

[130] For all of these reasons, the Board finds that the union violated section 95(*i*) of the *Code* when it suspended Mr. Jean as a member in good standing.

E–Conclusion

[131] For all of the reasons mentioned above, the Board allows the two complaints filed by Messrs. Lavoie and Jean and finds that the union breached its duty of fair representation under section 37 of the *Code* and contravened section 69 of the *Code*.

[132] The Board also allows Mr. Jean's complaint pursuant to section 95(*i*) of the *Code* in connection with the penalty imposed on him for filing a complaint under Part I of the *Code* and finds that Mr. Jean's status as a member in good standing must stand.

[133] In accordance with section 99(1)(*b*) of the *Code*, the Board has the power to order redress commensurate with assisting an employee to take and carry on such action or proceeding as the Board considers that the union ought to have taken and carried on on the employee's behalf or ought to have assisted the employee to take and carry on.

[134] Under section 99(2) of the *Code*, the Board is further authorized in addition to or in lieu of any other order under section 99(1) to do anything that it is equitable to require the trade union to do or to refrain from doing in order to remedy or counteract any consequence of the contravention of the *Code*. The legislator has granted the Board broad remedial powers. Section 99(2) of the *Code* does not set any specific limits to its remedial powers. Also, remedies must be proportional to the wrong that was found to have been committed, and ensure the fulfilment of the objectives of the *Code*. The principles relating to remedy stated by Justice Cory in *Royal Oak Mines Inc.* v. *Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369, are key in this case:

> In my view remedies are a matter which fall directly within the specialized competence of labour boards. It is this aspect perhaps more than any other function which requires the board to call upon its expert knowledge and wide experience to fashion an appropriate remedy. No other body will have the requisite skill and experience in labour relations to construct a fair and workable solution which will enable the parties to arrive at a final resolution of their dispute. Imposing remedies comprises a significant portion of the Board's duties. Section 99(2) of the *Canada Labour Code* recognizes the importance of this role and accordingly, gives the Board wide latitude and discretion to fashion

> "equitable" remedies which it feels will best address the problem and resolve the dispute. By providing that the Board may fashion equitable remedies Parliament has given a clear indication that the Board has been entrusted with wide remedial powers. Furthermore, a broad privative clause in s. 22(1) provides that, not only are the Board's **decisions** final, but so too are its **orders**. This provision lends support to the position that the court should defer to the remedial orders of the Board which are made within its jurisdiction. That is to say there should be no judicial interference with remedial orders of the Board unless they are patently unreasonable.
>
> (pages 404–405; emphasis in original)

[135] However, before exercising the powers vested in it, the Board refers the matter to Mr. Jean-Daniel Tardif, Industrial Relations Officer with the Board, in order that he may assist the parties in finding a common ground for redress.

[136] Given that the employers are interested parties in matters of redress under section 37 of the *Code*, notice is to be served on the employers inviting their attendance on this issue.

[137] The parties have 45 days from the date of the issuance of these reasons to come to a settlement. Should the parties be unable to reach a settlement, the Board will reopen the matter, as was agreed with the parties at the start of the hearings, and decide an appropriate redress after considering the parties' submissions.

Certified Translation
Communications

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